Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNJITED STATES

JUAN DE DIOS DIAZ FLORES,

Petitioner

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Fifth Circuit Court of Appeal erred in denying political asylum and withholding of removal where the pattern and practice of persecution of five of Petitioner's colleagues caused Petitioner to have a well-founded fear of persecution in Honduras.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan de Dios Diaz Flores respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal (App. 7a) is not reported. The Opinion of the Board of Immigration Appeals (App. 10a) is not reported. The Opinion of the Immigration Judge (App. 13a) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on August 13, 2004 and the Petition for Rehearing was denied on October 6, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 208(a) of the Immigration and Nationality Act:
(App. 1a)
Section 212 of the Immigration and Nationality Act:
(App. 2a)
Section 241(b)(3) of the Immigration and Nationality Act:
(App. 3a)
8 C.F.R. § 208.13(b):

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:
(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of

last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

STATEMENT OF THE CASE

Mr. Diaz Flores fled from Honduras on February 15, 2000 and entered the United States on March 11, 2000 at Eagle Pass, Texas, where he was apprehended by the Border Patrol. At that time, he requested political asylum.

At his August 24, 2000 Individual Hearing, the Immigration Judge, while finding that Mr. Diaz Flores' testimony was credible, nonetheless denied Mr. Diaz Flores' applications for political asylum and withholding of removal under the statute. (App. 13a)

Mr. Diaz Flores then appealed the Immigration Judge's decision to the Board of Immigration Appeals (BIA) on December 29, 2001. On July 3, 2003, the BIA dismissed Mr. Diaz Flores' appeal, stating that Mr. Diaz Flores' applications for asylum and withholding of removal were denied because he failed to establish past persecution, a well-founded fear of future persecution required for a grant of political asylum and he also failed to satisfy the clear probability standard of eligibility needed for a grant of withholding of removal under the statute. (App. 10a) Mr. Diaz Flores then timely filed to the Fifth Circuit Court of Appeals a petition for review of the BIA's decision.

In its Decision rendered on August 13, 2004, the Court of Appeals for the Fifth Circuit denied Petitioner's appeal of the Board of Immigration Appeals' denial of his application for asylum by stating that it was satisfied that the BIA's decision was supported by substantial evidence. (App.7a) The Panel stated that although the IJ concluded that Petitioner's testimony was generally credible, he was concerned about Petitioner's unexplained failure to produce evidence from friends, family and other union officials to corroborate the threats to him or the harm to colleagues.

(App. 9a) The Panel goes on to state that because of Petitioner's unexplained failure to produce this evidence, the IJ concluded that Petitioner failed to carry his burden of proof to establish that he had suffered persecution in the past or had a well founded fear of persecution. (App. 9a)

The Petitioner then filed a Petition for Rehearing with the Fifth Circuit, stating that he believed that the Panel had overlooked the fact that, as submitted and presented at oral argument, the regulations at 8 C.F.R. 208.13(b)(2)(iii) do not require him to show that he was singled out individually for persecution if he can show a pattern or practice of persecution to others similarly situated to himself. Petitioner has shown the pattern and practice of murder of his colleagues to whom he had been similarly situated and their murder had occurred on account of their political opinion. He has also shown that it would be unreasonable for him to seek relocation in Honduras. His Petition for Rehearing was denied. (App. 7a).

REASONS FOR GRANTING THE WRIT

I. The Decision below conflicts with the regulations

In the case at Bar, the Fifth Circuit has not followed the regulations as found at 8 C.F.R. 208.13(b)(2)(iii)(A) & (B). He has shown that he has a well-founded fear of persecution based upon the pattern and practice of the murdering of five of his colleagues, similarly situated to himself.

Petitioner had been both a political party leader and a union leader, like his murdered colleagues. And even after he resigned his government job, he served as a union advisor and also remained politically active. It was these continued union and political activities that caused him to continue to

receive death threats because it did not matter to his persecutors what titles he may or may not have held. Rather, it was the *activities* that he continued to undertake, despite their warnings to him to cease such activities, that were of concern to the persecutors. See In re S-P-, 21 I. & N. Dec. 486 (BIA 1996).

Petitioner was found to be generally credible by the Immigration Judge. He has shown that a pattern and practice of persecution has occurred to colleagues to whom he had been similarly situated. Mendoza v. INS, 13 Fed. Appx. 515, 517 (9th Cir. 2001) (acts of violence against applicant's friends and family may establish a well-founded fear where these acts create a pattern of persecution closely tied to the petitioner), citing Cordon-Garcia v. INS, 204 F. 3d 981, 985 (9th Cir. 2000) (acts of violence against applicant's friends and family may establish a well-founded fear where these acts create a pattern of persecution closely tied to the petitioner), *citing* Arriaga-Barrieta v. INS, 937 F. 2d 411, 414 (9th Cir. 1991) (acts of violence against the petitioner's friends or family may establish a well-founded fear, notwithstanding an utter lack of persecution against the petitioner herself). Even when he no longer held his government job but served as a union advisor and party activist, his political opinion and membership in the social group of union and party leaders were imputed to him by his persecutors as evidenced by the threats he received for those continued activities. Petitioner has therefore sustained his burden of proving that he has a well-founded fear of future persecution. Matter of Mogharrabi, 19 I & N Dec. 439, (BIA 1987) (imputed political opinion); Amanfi v. Ashcroft, 328 F.3d 719, 2003 U.S. App. LEXIS 9469 (3d Cir. 2003) (imputed membership in a social group).

Petitioner stated that in 1997, Carlos Escaleras Mejia, a friend and colleague of his who was the UD candidate for mayor of Tocoa, was brutally assassinated after denouncing

local corruption. In 1998, Carlos Luna, Petitioner's colleague, was murdered by unidentified individuals apparently because of his opposition to the exploitation of forests. He was the second UD member murdered allegedly because of political actions and opinions. Luna was an outspoken critic of commercial logging companies in Olancho, on the Atlantic Coast, and had complained of receiving death threats to the public prosecutor's office. Another of Petitioner's colleagues, Juan Ramon Benjarano was murdered in Saba, Honduras in January 1999 and in February 2000, Petitioner's colleague—a union and UD party leader, Jairo Ayala Nunez, was killed. Ayala had been very involved with a group of rural poor who had sought through legal means to secure the return of military training grounds that had been taken away from them. This was very controversial work and the UD party had been outspoken in its support of it. Ayala had received numerous death threats and prior to his death he had even drawn up a list of persons who had threatened his life.

In addition to testifying to the foregoing, Petitioner provided corroborating evidence as to the murder of his colleagues in the form of newspaper and journal articles, which are also substantiated by the Department of State's Human Rights Report and Country Reports for Honduras. Furthermore, he provided evidence to substantiate the fact that he had worked with the union and he also provided evidence as to his party membership and confirmation by his party as to his colleagues' murders.

Finally, it would have been difficult for Petitioner to relocate and hide from the powerful interest groups against which he and the UD had been outspoken, especially since Petitioner had traveled extensively and was known throughout Honduras in connection with his union activities in the fifty-two different sections of the union. Also, since the country conditions in Honduras have not changed and

some of the killers of at least two of his colleagues remain at large, per the Department of State's Human Rights Reports for Honduras, Mr. Diaz Flores would not be safe were he to be returned to Honduras.

II. The Decision below conflicts with authority from other circuits

While the Fifth Circuit denied the Petition for Review, six of the Circuits follow the regulations at issue here. In the First Circuit, Jalloh v. Ashcroft, 103 Fed. Appx. 402, 404 (1st Cir. 2004), stated "[w]e have characterized the appropriate inquiry as "whether a reasonable person in the asylum applicant's circumstances would fear persecution on account of a statutorily protected ground," Aguilar-Solis v. INS, 168 F.3d 565, 572 (1st Cir. 1999). An alien need not provide evidence of being singled out, however, if he or she can establish 1) "a pattern or practice in his or her country of nationality" of the persecution of similarly situated persons and 2) "his or her own inclusion in, and identification with, such group of persons." 8 C.F.R. § 208.13 (b)(2)(iii)(A) (citing also Knezevic v. INS, 367 F.3d 1206, 1213 (9th Cir. 2004) (citing Kotasz v. INS, 31 F.3d 847, 852 (9th Cir. 1994)) (asylum applicants not required to demonstrate that they would be "singled out" for persecution because "'persecution of an entire group can render proof of individual targeting entirely superfluous'").

Likewise, in Abay v. Ashcroft, 368 F. 3d 634, 643 (6th Cir. 2004), Judge Sutton concurred in the decision and stated "[t]hat an asylum applicant fails to show "a reasonable possibility [that] . . . she would be singled out individually for persecution," however, does not end the inquiry. 8 C.F.R. § 208.13(b)(2)(iii). An asylum applicant may still qualify as a refugee if she can show "that there is a pattern or practice . . . of persecution of a group of persons

similarly situated" and that she is included within that group. *Id.* § 208.13(b)(2)(iii)(A); see Ramsameachire v. Ashcroft, 357 F.3d 169, 183 (2d Cir. 2004).

Moreover, according to Caprie v. Ashcroft, 355 F. 3d 1075, 1093 (7th Cir. 2004), in order for Capric's *per se* argument to succeed, even if he demonstrated a subjective fear of persecution, he must still prove that "there is a pattern and practice of persecution of an identifiable group, to which he belongs, such that his fear is reasonable" (the objective requirement). 8 C.F.R. § 208.13(b)(2)(iii); see Hoxha v. Ashcroft, 319 F.3d 1179, 1183 n.6 (9th Cir. 2003); but cf. Ahmad v. INS, 163 F.3d 457, 463 (7th Cir. 1999) (expressly rejecting a *per se* rule).

Similarly, in Woldemeskel v. INS, 257 F.3d 1185, 1190 (10th Cir. 2001), the Court held "Ms. Woldemeskel may prove a well-founded fear of persecution based on her Amhara ethnicity or political opinion in one of two ways: she may demonstrate that she would be singled out personally for persecution in Ethiopia, or she may show she has a reasonable fear of persecution because of her membership in a group subject to "a pattern or practice of persecution." 8 C.F.R. § 208.13(b)(2)(iii)(A)-(B). The group must consist "of persons similarly situated to [her] on account of race, religion, nationality, membership in a particular social group, or political opinion." Id. § 208.13(b)(2)(iii)(A).

CONCLUSION

The Fifth Circuit Court of Appeal erred in denying political asylum and withholding of removal where the pattern and practice of persecution of five of Petitioner's colleagues caused Petitioner to have a well-founded fear of persecution in Honduras. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Section 208(a) of the Immigration and Nationality Act:

Authority to Apply for Asylum.-

(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence

that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

Section 212 of the Immigration and Nationality Act:

a) Classes of Aliens Ineligible for Visas or Admission.- Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States: (6) Illegal entrants and immigration violators.-

(A) ALIENS PRESENT WITHOUT admission or parole.-

(i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United

States at any time or place other than as designated by the Attorney General, is inadmissible.

Section 241(b)(3) of the Immigration and Nationality Act:

(b) Countries to Which Aliens May Be Removed.-

(3) Restriction on removal to a country where alien's life or freedom would be threatened.-

(A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.-Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that-

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime

outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.03-60631

JUAN DE DIOS DIAZ FLORES
Petitioner
V.
JONH ASHCROFT, U S ATTORNEY GENERAL
Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DAVIS, and EMILIO M.GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

S/_____

United States Circuit Judge

REGH-3

CLERKS NOTE:
SEE FRAP AND
LOCAL
(ILLEGIBLE) FOR STAY OF THE
MANDATE

U.S. COURT OF APPEALS
FILED
OCT 06 2004

CHARLES R. FILBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 03-60631

JUAN DE DIOS DIAZ FLORES

Petitioner,

VERSUS

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL,

Respondent.

Petition For Review of an Order
Of the Board of Immigration Appeals
A78-175-873

Before HIGGINBOTHAM, DAVIS, EMILIO M. GARZA, CICUIT JUDGES,

Per Curiam* :

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* Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Petitioner Juan de Dios Diaz Flores ("Diaz Flores") appeals the Board of Immigration Appeals' ("BIA") denial of his application for asylum and order of removal to Diaz Flores's home of country Honduras.

In February 2000 Juan de Dios Diaz –Flores ("Diaz-Flores") fled Honduras and traveled to the United States seeking asylum. In March 2000 he was detained by immigration officers as he attempted to enter the United States. At that time he sought political asylum and his petition was set for hearing before an immigration judge ("IJ"). After the hearing, the IJ held that the petitioner had not satisfied his burden of proving past persecution as required to receive asylum.8 U.S.C. § 1101 (a) (42) (A). The IJ then denied the petition for asylum and the request to withhold removal. The BIA affirmed the IJ's order and Diaz Flores prosecutes this appeals.

At his evidentiary hearing Diaz Flores testified that he and his family received frequent death threats from 1990 to 2000 for petitioner's participation in a hospital workers union and a dissenting political party. Several of Diaz Flores's colleagues in the political party were killed between 1997 and 2000, and petitioner finally made the decision to flee Honduras when a close colleague was killed in early 2000.

Although the IJ found Diaz Flores's testimony credible, some of that testimony is undermined by facts petitioners presented to the IJ. First, Diaz Flores remained in Honduras for ten years after he first received death threats, and despite receiving numerous threats he only notified the authorities of the threats and intimidation on two occasions. Second, Diaz Flores's family has remained in Honduras since the petitioners left in February 2000; they have received no death threats and have not been harmed.

Although the IJ concluded that the petitioner's testimony was generally credible, he was concerned about petitioner's unexplained failure to produce evidence from friends, family and other union officials to corroborate the threats to him or the harm to colleagues. Because of petitioner's unexplained failure to produce this evidence, the IJ concluded that the petitioner failed to carry his burden of proof to establish that he had suffered persecution in the past or had well founded fear of persecution.

We owe difference to findings of the IJ and BIA, reviewing their factual findings under the substantial evidence standard. In reviewing for substantial evidence we must uphold the BIA's or IJ's factual findings "unless the evidence is so compelling that no reasonable fact finder could fail to find otherwise." *Lopez Gomez v. Ashcroft*, 263 F. 3d 442, 444 (5th Cir. 2001) (internal quotation marks omitted). After carefully reviewing the records, we are satisfied that the BIA's decision denying asylum is supported by substantial evidence.[1]

For the reasons stated above we affirm the BIA's order.
AFFIRMED.

United States Court of Appeals
Fifth Circuit
FILED
August 13, 2004

Charles R . Fulbruge III
Clerk

---

[1] Where asylum is not appropriate withholding removal is also inappropriate. See *Efe v. Ashcroft*, 293 F. 3d 899, 906 (5th Cir. 2002).

Decision of the Board of Immigration Appeals

DEPARTMENT OF JUSTICE

Executive office for immigration review

Falls Church, Virginia 22041

FileA78 175 873-San Antonio

In re: JUAN DE DIOS DIAZ FLORES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Terry S. Coonan, Esquire

CHARGE:

Notice: Sec.212 (a)(6)(A)(i),I&N Act[8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal

The respondent, a native and citizen of Honduras, appeals from the Immigration Judge's August 24, 2000 denial of his applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1231 (b)(3). The appeals will be dismissed.

On appeal, the respondent argues that he established past persecution and a well founded fear of future persecution on account of activities as a party member and

union leader. Specifically, he maintains that he was one of the local founders of the political parties comprised of union members in his town in 1997. Several of the other local leaders of his party, who had also been union leaders, were assassinated by pro government forces.

We note that the respondent bears the burden of establishing past persecution and a well-founded fear of future persecution based one of the five protected ground of the Act. *See* section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); *INS v. Elias Zacarias,502 U.S. 478, 481 (1992); INS v. Cardoza- Fonseca,* 480 U.S. 421, 428 (1987). The Immigration Judge found that the respondent was credible in his testimony, but did not meet his burden of proof to establish entitlement to asylum and denied relief. We agree with the immigration Judge's decision. The respondent failed to establish past persecution or a well-founded fear of future persecution on account of one of the five protected grounds. In particular, we note that he no longer held a position in the union or political party at the time he fled Honduras in 2000 (I.J. at 12). He maintained that he was the target of many death threats from 1990 to 2000. However, the reasonableness of the respondent's fear is lessened by his having remained in Honduras for this 10-year period in which he claimed that he feared for his life. In addition, at the time that the respondent fled Honduras in February 2000, he no longer held a position in the political party (I.J.at12). The respondent further reduced his exposure when he left his government job in 1999 (Tr. at 68). We note that the respondent also contends that his family's lives were threatened because of his union and political activities, but they continue to live in Honduras without incident. *See Matter Of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998). Based on the foregoing, the respondent has not established either that his experiences in Honduras constitute "persecution" within the meaning of the Act or that he has a well-founded fear of future persecution because of his past political and union

activities if he were to return to Honduras. *See Matter of Mogharrabi,* 19 I&N Dec.439 (BIA1987). Therefore, the appeal will be dismissed.

Inasmuch as the respondent has failed to establish that his life or freedom would be threatened in Honduras, he has failed to clarify the clear probability standard of clear eligibility required for with holding of removal. *See* section 241 (b)(3) of the Act; *INS v. Stevic,* 467 U.S.407,429-30 (1984). Based on the foregoing, the appeal will be dismissed.

ORDER: The appeal is dismissed.

S/_____
FOR THE BOARD

RECEIVED DEPARTMENT OF JUSTICE
2003 JUL-8 AM 9:40
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
SAN (ELEGIBLE)TEXAS

IMMIGRATION COURT
615 E.HOUSTON ST. ROOM 578
SAN ANTONIO, TX 78205-2040

In the matter of

Case No.: A78-175-873

Diaz-Flores, Juan De Dios
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on, August 24, 2004. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official decision of the case.

[x] The respondent was ordered removed from the United States to Honduras or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____ with an alternate order of removal to

[x] Respondent application for asylum was ( ) granted (x) denied ( ) withdrawn.

[x] Respondent's application for withholding of removal was ( ) granted (x) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A was ( ) granted ( ) denied ( ) withdrawn

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b) (1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( )granted ( )denied ( )withdrawn or ( ) other .
[ ] Respondent's application for a adjustment of status under section ____ of INA was ( ) granted ( )denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's status was rescinded under section 246.
[ ] respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission , respondent is to post a $_____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[x] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other:_____

Date: 8-24-00

Appeal: Waived/Reserved (Due by Respondent)

Appeal Due By: 9-25-00 _____

JOHN D. CARTE
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY; MAIL (M) PERSONAL SERVICE (P)
TO: [ ]ALIEN [ ] ALIEN c/o Custodial Office [ ] ALIEN's ATT/REP [ ] INS DATE Aug. 24,2000 BY: COURT STAFF S/_____
Attachments [[EOIR-33 [ ] EOIR-20 [ ] Legal Services List [ ] Other

---

Q6

Alien Number:A78115873

LIMITATIONS ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR

( )1. You have been scheduled for a removal hearing, at the time and place set forth on the attached removal sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain form of relief under the immigration and Nationality Act (see section A. below) for a period of ten (10) years after the date of entry of the final order or removal.

( )2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control**will result in your being found ineligible for certain forms of relief under the immigration and Nationality Act (see section A. below) for a period of ten 10 years from the date of your scheduled hearings.

( )3. You have been granted voluntary departure from the United States pursuant to section 240Bof the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control**will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act(see section A. below) for a period of ten (10) years from the date of scheduled departure or the date of unlawful reentry, respectively. Your voluntarily departure bond, if any, will be breached. Additionally, if you fail to voluntary depart the United States within the time period specified, you shall be subjected to a civil penalty of not less than $1000 and not more than $5000.

(x)4. An order of removal has been entered against you. If you fail appear pursuant to a final order of removal to a time

and place ordered by the INS, other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see section A. below) for a period of ten (10) years from the date you are scheduled to appear.

**the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELEIF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:
(1)Voluntary departure as provided in section 240B of the Immigration and Nationality Act;
(2) Cancellation of removal as provided in section 240A of the Immigration and Nationality Act; and
(3) Adjustments of status or change of status as provided for in section 245, 248,or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the content of this notice must be given in his/her native language, or in a language he/she understands by the Immigration Judge.

Immigration Judge: S/_____ or court clerk:_____

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY:MAIL(M) PERSONAL SERVICE(P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer ( ) Alien's ATT/REP ( ) INS
DATE_____BY:COURT STAFF_____
Attachments: ( ) EOIR-33 ( ) EOIR-28( ) Legal Services ( ) Other

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Antonio, Texas

File No. A 78 175 873 August 24,2000

In the Matter of	)	
JUAN DE DIOS –DIAZ	)	IN REMOVAL
FLORES	)	PROCEEDINGS
	)	
Respondent	)	

CHARGE: Section 212 (a) (6) (A) (i) of the Act – alien present in the United States without being admitted or paroled.

APPLICATIONS: Asylum under section 208 the Act; withholding of removal under section 241 (b) (3) of the Act.[1]

ON BEHALF OF THE RESPONDENT :
Terry Coonan, Esquire
8930 Four Winds
Suite 106
San Antonio, Texas 78239-1971

ON BEHALF OF SERVICE
Claire Matecko
Assistant District Counsel
P.O. Box 1939
San Antonio, Texas 78297-1939

[1] The respondent, through his counsel of record, specifically declined pre-merits voluntary departure in lieu of removal and withholding of removal under the Convention Against Torture.

ORAL DECISION OF THE IMMIGRATION JUDGE

STATEMENT OF THE CASE

The respondent is an adult male, a native and citizen of Honduras. He entered the United States at or near Eagle Pass, Texas on or about March 11,2000. He was not then admitted or paroled after inspection by an Immigration officer. He was placed in removal proceedings upon issuance of Form I-862, Notice to Appear, dated March 11, 2000. Exhibit1.

The respondent, through counsel of record, admitted and conceded the allegations and the charge. See Motion for Change of Venue, Exhibit 3. The court designated Honduras for purposes of removal should that become necessary.

The respondent requested asylum and also withholding of removal under section 241(b) (3) of the Act. The respondent provided his asylum application, Exhibit 6.

STATEMENT OF THE LAW

ASYLUM

Burden of Proof

The respondent bears the evidentiary burdens of proof and persuasion. 8 C.F.R. Section 208.13(a); Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified, Matter of Mogharrabi, 19 I&N Dec.439 (BIA 1987). Where an alien's testimony is the only evidence available it may suffice with the introduction of corroborating evidence and it should be presented where available. Matter of Dass,20 I&N Dec. 120 (BIA 1989).

Background Information

As reiterated and clarified in Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997), general background information on

country conditions must be included in the record as a foundation for an asylum claim. The absence of corroboration may lead to a finding of failure to meet the burden of proof. Id at 725-26; Matter of M-D-, 21 I&N Dec. 1180 (BIA1998).

Credibility

The applicant must testify in support of his application asylum. 8 C.F.R. Section 240.11(c). Credible testimony is plausible , detailed, internally consistent, consistent with the application, and unembellished. Matter of Y-B-, 21 I&N Dec. 1106 (BIA1998), Matter of B- , 21 I&N Dec. 66 (BIA 1995); and Matter of Lugo Guadiana, 12 I& N Dec. 726, 729 (BIA 1968). A finding of credible testimony is essential, Matter A-S-, 21 I&N Dec. 1106 (BIA 1998), but it is not necessarily dispositive, Matter of E-P-, 21 I&N Dec.860 (BIA 1997).

Asylum Eligibility

To establish eligibility for a grant of asylum under Section 208 of the Act, an alien must demonstrate that he is a refugee. Section101 (a) (42) (A) of the Act; see Matter of Acosta, at 219; 8 C.F.R. Section 208. 13(b)(2).

Fear of Persecution

The applicant's fear must be a refugee's primary motivation for seeking refuge in the United States. Matter of Acosta, at 219. Persecution does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997), reversed on other grounds, 175 F.3d 732 (9th Cir. 1999).

Well-Founded Fear

An applicant establishes a well-founded fear if it is: 1) subjectively genuine to the applicant, and, (2) objectively reasonable, i.e. a reasonable person in the applicant's, circumstances would fear persecution. Matter of Acosta at 226; Matter of Mogharrabi, supra.

On Account of Grounds

An applicant need not show conclusively why persecution occurred in the past or is likely to occur in the future, Matter of S-P-, 21 I&N Dec. 486 (BIA 1996), but must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground. INS v. Elias-Zacarias, F.2d U.S. 478 (1992) (sic); Matter of T-M-B-, supra.

Unwillingness to return

An alien in refugee status is a concept that an individual requires international protection because his country is no longer safe. Matter of Acosta, at 235. A well-founded fear of persecution must be shown to exist not just in a particular place within the country, but countrywide. Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997).

Past Persecution

Refugee status may be established by the objective fact alone of past persecution. Matter of Chen, 20 I&N Dec. 16, 18.(BIA1989).

Discretion

Asylum is discretionary. INS v.Cardoza-Fonseca, 480 U.S. 421 (1987); see 8 C.F.R. Section 208.13 (d).

Discretion must be exercised. Matter of Gamboa, 14 I&N Dec. 244, 248 (BIA1972), modified on other grounds, Matter of Torre, 19 I&N Dec.18 (BIA 1984), citing to Hintopoulos v. Shaugnessy, 353 U.S. 72 (1997). The asylum applicant has the burden of establishing discretion is warranted. Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

WITHHOLDING OF REMOVAL

As to burden of proof , background information and credibility see asylum above.

Clear Probability of Persecution

To establish eligibility for withholding of removal of pursuant to section 241(b) (3) of the Act, an alien must demonstrate that his life or freedom would, not might or could, be threatened by demonstrating a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. INS v Stevic, 467 U.S. 407 (1984). This means that it is more likely than not that he would be subject to persecution. 8C.F.R. Section 208.16 (b) (1). Withholding does not reference the term refugee in Section 101 (a) (43) (A) of the Act. Indeed , every refugee is not entitled to withholding . INS v Stevic at 428. Withholding is a higher burden of proof than asylum which is a more generous standard and there is no subjective component to withholding. Matter of Mogharrabi at 447.

No Discretion

Withholding is not discretionary. 8 C.F.R. Section 208 16 (c).

STATEMENT OF THE FACTS

Documentary Evidence

The record of proceedings contains the respondent's defensive asylum application, Form I-589, Exhibit 6. The Court sent a copy of the application to the Department of state for an advisory opinion. None was returned. Exhibit 8. The respondent, through counsel, offered various documentation. He provided a supplemental statement, Exhibit 9. He provided bioghraphic information, Form G-325A, Exhibit 10. He provided various background documents and letters such as indexed under Exhibit 11for identification. Included, and specifically admitted, is the Honduras Profile of Asylum Claims and Country Conditions dated January 1999, Exhibit 11-A; newspaper articles, Exhibits 11-D and 11-E; a translated letter from a union president, exhibit 11-F; another letter, 11-G; background information regarding the Democratic Unification Party, Exhibit 11-H; another letter from a party president, Exhibit 11-I ; newspaper articles 1in Exhibits 11-J and 11-K; other documentation under 11 for identification was withdrawn or rejected. Also denied was a party membership letter, Exhibit 12 for identification. The respondent testified. All documentary evidence, including the respondent's testimony, has been considered in reaching a decision even if not specifically mentioned.

Asylum Application

The respondent states his claim for asylum and withholding in his Form I-589, Exhibit 6. He provides the requisite background information at Part C, question 1. He states why he is seeking asylum.

> I fear persecution in my home country of Honduras on accounts of my activities as a member of the union to which I have belonged since 1985 (El Sindicato De Trabajadores De La Medicina

Hospitales Y. Similares) ("SITRAMEHDYS") in which I have served as a union leader for more than a decade. I likewise fear on account of my participation in a political party comprised of unions and union activists. This is a party called "El Partido De Unification Democratica" ("UD") and I was one of the local founders of the party in my town of Tocoa in 1997. Several of the other local leaders of this party, who were union leaders like myself, were assassinated by pro-government forces who opposed our leftist political ideas. The most recent assassination was of Jairo Ayala, in February of 2000. When death threats ensued against me, I fled the country.

The respondent states, in answering question 2, that he has belonged to an association. He states he belonged to the Health Care and Hospital Workers Union and a political party.

The respondent states that, yes, he or a family member has been mistreated or threatened by authorities due to membership in a particular social group and/or political opinion. "My activities as both a union leader and as a local leader of a nationwide political party have brought me into opposition with the government of Honduras and with powerful people who have a stake in maintaining the corruption of medical and health care field there. My public profile as a labor and political leader led to numerous death threats against me in 1990. In the wake of the assassination of a close colleague of mine in February 2000, I fled for my life."

The respondent answers question four that, " no, neither has ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned.

The respondent answers question 5 that, "no, he does not fear torture."

The respondent answer question 6 as to what he thinks would happen if he were to return. "I believe that I would be targeted for assassination as three of my friend and colleagues have been in the recent years. Like myself, these men were both union leaders and members of the "UD" Political Party. Carlos Escaleras Mejia was murdered in 1997, Carlos Luna in 199(8), and Jairo Ayala in February 2000.

Testimony

The respondent testified at length in support of his requested relief. He made corrections to his Form I-589 and generally affirmed its accuracy. He provided educational and work information, and related how he worked in the Ministry of Public Health as an inspector. He joined a union in 1985 first as a member and then chronicled through the years his progression in higher activities.

He related in May and June1990 that there was a national strike. He was the president of the local strike committee. The strikes ended in various directors being fired, the hospitals being militarized, and the respondent claiming he received death threats.

The respondent stated that the telephone threats were received at syndicate offices. He personally received such. The caller was not identified. The respondent was told to leave the communist actions in the area, to let the government work and not to strike, march on the street, or lower the government's position. If the respondent did not the respondent's family or the respondent would suffer.

The respondent related how the threats increased each time the union took action or petitioned.

The respondent stated that initially he did not take the threats seriously. He states in 1993 he had to change his lifestyle because the threats were increasing. He was being watched. Letters were sent to his wife. Anonymous letters were found under the door of his home. Such anonymous letters indicated that persons were going to annihilate the respondent. He was to leave the activities or his family would be in danger and he would be killed.

The respondent stated that, yes; he did bring the threats to the attention of military authorities. He states he first did this in1993. He next did it in 1996. Of the many other threats he received he states he did not report such. He states that the military's response was that they had no knowledge of groups that would harm the respondent. They could not guarantee his safety because of staffing levels.

The respondent states that in April 1997 he joined a political, the Democratic Unification Party. The respondent assumed a leadership role. The respondent stated that the problems for the party leaders increased and, in 1997 and after, there were five union leaders, who also belonged to the political party that were killed.

The respondent related the death of the persons he knew and were leaders of the political party. That included Carlos Mejia, Carlos Luna, Jairo Ayala, and others.

The respondent related how he was involved in a radio debate with a hospital administrator named Amado Murillo. During the debate the respondent states he was publicly denounced and called a communist. He states this 1997 incident was considered by him to be a threat but he did not report it.

The respondent states that he has in the United States family living in Florida. He states there are four brothers, one of whom is a United States citizen. The others are under temporary protected status. He states he has a sister that is a United States citizen. He did communicate with them prior to coming to the United States.

The respondent related how he has family in the Honduras. Living in his home town are his wife and four children ages approximately ages 2 through 17 years of age. He states he has had contact with his wife since leaving Honduras. She states that unknown persons are searching for him because they come and ask questions about him. Also living in Honduras apparently are two sisters, one of whom personally knows of the threats.

The respondent states that, yes, he does fear for his family safety in Honduras but apparently his wife's father-in-law has influence as a member of the government's Liberal Party and is able to protect his wife.

The respondent related that if he were to return to Honduras he fears that the same thing would happen to him that has happened to other union and political party members. That is, death.

Government counsel cross-examined the respondent. It was learned that the respondent left his job as a health inspector in January 1999 because in 1998 there was a strike and he was threatened with firing. He quit instead.

The respondent related how his wife is able to support herself in Honduras today because she continues to work as a government employee in the Ministry of Education, a job that he obtained for her in 1995.

He affirmed that while he was a health inspector he requested and ultimately was granted permission to be absent from work, still to be paid by the government, and conduct union activities. This was because the law mandated such.

The respondent related how he felt in 1990 he had been threatened by his supervisors. His later problems were not directly by supervisors, but he feels that such were directed by members of the government. He states that he did not report the threats because he did not take them seriously.

He was asked why he did not leave the Honduras in1993 if he took the threats seriously, and his answer was he had nowhere to go. He had a job. He was committed to the people through his union and local opposition. Again, he was asked why he did not leave in 1997 after the radio debate where being called a communist was considered by him to be a threat. He stated that he wanted to oppose the government and support his people. He was asked why he did not leave in1998 after Carlos Luna's death. The respondent stated that Mr. Luna lived approximately four hours away. He did not consider it a direct threat and apparently there was an agreement in the party that people should stay and oppose the government.

The respondent was questioned why he left Honduras in February 2000 as to what was then different than the prior decade of claimed problems. Ultimately, he stated that he no longer had a position in the party and his family in Florida advised him to leave.

Analysis

The respondent has provided the requisite background information on country conditions. The Honduras Profile of Asylum Claims and Country Conditions dated January 1999, Exhibit 11-A, at page 5 states in general terms the conditions in Honduras.

> The government does not have a policy of harassing or repressing workers, but the right to organize and bargain collectively is not always observed in practice. Retribution by employers for trade union activity is a common occurrence in spite of its prohibition by the Labor Code. In the past, some employers have obtained help from local police or military official to support their opposition to strikers.

The Freedom in the World, the Annual Survey of Political Rights and Civil Liberties, 1998-1999, Exhibit 11-B at 217, states that overall situation in Honduras by which the court must evaluate the respondent's claim.

> The honeymoon for incoming president Carlos Flores came to the halt in1998, as hurricane Mitch devastated the economy of Central America's poorest nation. Flores has promised to continue his predecessor's efforts to rein in an unruly military, but a waive of bank robberies, kidnapping's burglaries, and unsolved murders resulted in army troops patrolling the Honduras industrial capitol and other major cities in an effort to squelch violent crime.

Clearly the background information and documentation provided by the respondent, including his oral testimony, establish that Honduras has had a difficult time allowing unionization and opposition political parties. The respondent's testimony is overall consistent with his asylum application and, more so, with his supplemental statement, but for in a few areas. The inconsistencies in the respondent's oral testimony with his written application I consider to go more to the issue of burden of proof rather than credibility. The respondent's testimony was detailed. Therefore, credibility is not a primary issue for the Court.

Because the respondent may have testified overall in a credible manner, it does not resolve the issue of whether he has met his burden of proof, as stated in Matter of E-P-, supra. The respondent's testimony as to the specific issue of harm, the extent of it the impact of it, as required under Matter of Y-B-supra, is not corroborated as required Matter M-D-, supra. This is particularly so when such was readily available, but the respondent failed, even though being in close contact with his wife, to receive any statement from his wife, sister, father-in-law, friend, or union presidents, all whom he states have personal knowledge about the respondent's claim problems. See Matter of S-M-J, supra. Further, the reasonableness of the respondent's fear is reduced not only by his remaining in Honduras during the decade of his claimed problems where he states that he feared for his life, but his family's lives where also threatened and they, to this day, remain in Honduras in their homes apparently unharmed. See Matter of A-E-M-, 21 I&N Dec. 1157 (BIA 1998).

The respondent has failed in his burden of proof. He could have easily corroborated an essential part of his claim. First, that in fact he received threats because the documentation he did submit, such as the letter from the union president, Exhibit 11-F, states in such general terms, "he has encountered serious problems with the authorities of the Public Health Office of Honduras, because he held this leadership position and defended the interest of union workers, and the Honduran general public." That in no way supports respondent's claim that he personally received death threats, that his wife did, that his sister knew about such, that his father-in-law knew about such, and that others knew of such. This is essential because it does not appear to the Court that all union members or all members of political parties, based on the background information, are persecuted for one of the five grounds.

The respondent has failed to establish past persecution. He has failed to establish a well-founded fear of future persecution.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Accordingly, the following facts and conclusions of law are made.

I find that the Court has jurisdiction over the subject matter and the respondent in these proceedings on the proposition of the Service in filing the charging document.

I find that no issues of law or fact remain.

I find that the respondent is not a citizen or a national of the United States, but an alien.

I find that the defendant is deportable as charged by evidence that is clear, convincing, and, to any extent necessary, unequivocal. See Woodby v. INS, 385 U.S. 276 (1966).

I find that the Court designated the country of Honduras for purposes of deportation or removal should that become necessary.

I find that the respondent timely applied for asylum and withholding of removal under Section 241 (b) (3) of the Act.

I find that the respondent has abandoned and declined pre-merits voluntary departure in lieu of removal and withholding of removal under the Convention Against Torture.

I find, as to the relief of asylum, the respondent has not established his burden of proof. He did testify overall

credibly. He has not established he is a refugee, but had he would have merited a favorable exercise of discretion.

I find, as to the relief of withholding of removal under Section 241(b)(3) , as the respondent has failed to establish his burden of proof as required for asylum, he has like wise failed to meet that required for withholding.

According, (sic) the following orders are entered:

ORDER

IT IS ORDERED that the respondent's request for asylum is denied.

IT IS FURTHER ordered that the respondent's request for withholding of removal under Section 241(b)(3) of the Act is denied.

IT IS FURTHER ORDERED that the respondent shall be removed from the United States to Honduras as charged.

S/_____

JOHN D. CRATE
United States Immigration Judge